

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEECLIFTON JEROME MOORE,

Defendant-Appellant.

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UNPUBLISHED

September 20, 2007

No. 269246

Kent Circuit Court

LC No. 05-009552-FC

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for first-degree, felony murder, MCL 750.316(1)(b). The underlying felony was the first-degree child abuse of a two-year-old victim. The trial court sentenced defendant to life imprisonment. We affirm.

First, defendant argues that the trial court erroneously admitted unfairly prejudicial evidence of an alleged prior bad act of child abuse by defendant. We disagree. This Court reviews the admission of evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). “[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, this Court reviews de novo evidentiary issues, which are based on preliminary questions of law. *People v Katt*, 468 Mich 272; 662 NW2d 12 (2003).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Three factors are considered when determining the admissibility of “prior-bad-acts” evidence under MRE 404(b):

“[F]irst, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice . . . and fourth, from [FRE] 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.” [*People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), quoting *Huddleston v United States*, 485 US 681, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988).]

Regardless of the existence of those factors, “it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place.” *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Thus, Michigan courts have admitted other-acts evidence under the res gestae exception to MRE 404(b) in cases where previous or subsequent acts were “ ‘so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime.’ ” *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), quoting *State v Villaricencio*, 95 Ariz 199, 201; 388 P2d 245 (1964). Our Supreme Court provided the following rationale for the res gestae exception:

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the “complete story” ordinarily supports the admission of such evidence. [*Delgado, supra* at 83 (citations omitted).]

In this case, two neighbors testified that they observed defendant and the victim on August 23, 2005, the day before the child abuse leading to the victim’s death occurred. They saw defendant swinging the victim around by his arms; both believing that activity was too dangerous for such a young child. The victim was scared during the incident. One neighbor testified that this activity made her uncomfortable and she could not bear to watch it. The other neighbor testified that she watched the victim participate in a forced march after he was swung around, during which the victim walked as if he was a “zombie,” only changing direction in response to defendant’s grunts. This neighbor was so concerned that she attempted to call Child Protective Services on that night, and finally placed her call on the following day. The trial court ruled the challenged evidence admissible stating that “I suspect it’s probably not 404(b). It is simply . . . going to identify some other injuries. It would have been preferable to be cautious and give the notice required by the rule just in case, although I don’t think in the end the rule likely covers it.”

We agree with the trial court that the evidence is not covered by MRE 404(b). The testimony falls within the res gestae exception. The challenged testimony related to defendant’s treatment of the victim during the immediate time preceding his death. That testimony demonstrated that defendant’s conduct was inappropriate in the extreme in caring for the toddler. Moreover, defendant’s conduct was incidentally connected with the allegation of first-degree

child abuse. It was key that the prosecution proved beyond a reasonable doubt that defendant knowingly or intentionally caused serious physical harm to a child. *People v Martzke (On Remand)*, 251 Mich App 282, 287; 651 NW2d 490 (2002). The jury had to determine what happened between defendant and the victim, and “[t]he more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty.” See *Scholl, supra* at 742. Thus, the jury was entitled to have the facts concerning August 23 as an integral part of the events which played out on August 24. *Delgado, supra* at 84. We conclude that the trial court did not abuse its discretion in admitting the testimony of the two neighbors regarding the August 23, 2005, incident, because the ruling was a reasonable and principled outcome. *Babcock, supra* at 269.

In reaching our conclusion, we note that, because the challenged evidence was not admitted pursuant to MRE 404(b), the notice requirement of MRE 404(b)(2) does not apply to this case.

Next, defendant contends that the trial court erred by giving an improper jury instruction on felony murder. We agree. This Court reviews de novo claims of instructional error. *People v Hernandez-Garcia*, 266 Mich App 416, 417; 701 NW2d 191 (2005), vac’d in part on other grounds 477 Mich 1039 (2007). Instructions are examined as a whole, and, “even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant’s rights by fairly presenting to the jury the issues to be tried.” *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). The instructional error is preserved, nonconstitutional error. *Id.* at 408. MCL 769.26<sup>1</sup> creates a presumption that an instructional error is harmless, “which presumption may be rebutted by a showing that the error resulted in a miscarriage of justice.” *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999). Thus, “defendant has the burden of establishing a miscarriage of justice under a ‘more probable than not’ standard.” *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), quoting *Lukity, supra* at 493-494.

A trial court’s jury instructions must include all of the elements of the charged offense, and it must not exclude any material issues, defenses, or theories, which are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). This Court has held previously that even if jury instructions are somewhat imperfect, such instructions do not create error if they fairly present the issues for trial and sufficiently protect the defendant’s rights. *People v Tate*, 244 Mich App 553, 568; 624 NW2d 524 (2001).

As discussed previously, this case involved felony murder, MCL 750.316(1)(b), with the underlying felony of first-degree child abuse, MCL 750.136(b)(2). MCL 750.136(b)(2) provides

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<sup>1</sup> MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

in pertinent part that “[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child.” Our Supreme Court held that the requisite intent for first-degree child abuse requires that defendant must intend to cause the harm, not merely perform an act, which causes the harm. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004).

MCL 750.316(1)(b) provides in pertinent part: “[a] person who commits any of the following is guilty of first-degree murder and shall be punished by imprisonment for life: [m]urder committed in the perpetration of, or attempt to perpetrate . . . child abuse in the first degree.” The elements of felony murder include the following: “(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute].” *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). The malice element of felony murder is defined as “(1) the intent to kill, (2) the intent to do great bodily harm, or (3) a wanton and willful disregard of the likelihood that the natural tendency of the defendant’s act is to cause death or great bodily harm.” *Dumas, supra* at 396.

Long ago, our Supreme Court abolished the common-law felony-murder rule, where a defendant was guilty of felony murder if the prosecution merely proved that the defendant had the requisite intent to commit the underlying felony. *People v Aaron*, 409 Mich 672, 727-728; 299 NW2d 304 (1980). In other words, the common-law rule equated malice with the intent to commit the underlying felony. *Id.* Now, the prosecution “must prove one of three intents that define malice in every murder case.” *Dumas, supra* at 397. In abolishing the common-law rule, our Supreme Court explained that “the malice necessary for a felony-murder conviction cannot be inferred from the intent to commit the underlying felony alone.” *Id.* at 398. However, “the jury may infer a malicious intent from the facts and circumstances of the underlying felony.” *Id.*

In this case, the trial court explained that defendant was charged with first-degree murder, noting the distinction between premeditated murder and felony murder. However, the trial court combined its instruction on felony murder with its instructions on first-degree child abuse. In doing so, the trial court ultimately instructed the jury that the prosecution must prove the following elements beyond a reasonable doubt to sustain a felony murder verdict: (1) defendant caused some very serious physical harm or injury to a child; (2) defendant either intended to cause serious physical harm to the child or that he knew that serious physical harm would be caused by his actions; (3) defendant was caring for the victim; and (4) the victim then died as the result of the serious physical injury. The trial court’s instruction completely obfuscated what the prosecution had to prove in the context of felony murder. Significantly, the trial court failed to instruct the jury on the malice element of felony murder or to instruct that malice could be inferred from the circumstances surrounding the incident. See *Dumas, supra* at 400. Here, the trial court expressly stated “[i]f [first-degree child abuse] is proven, then that substitutes for premeditation, and that’s why it’s still murder in the first degree, even though it’s not premeditated.” The instruction erroneously omitted that the prosecution must prove malice beyond a reasonable doubt. In *People v Wilder*, 411 Mich 328, 340; 308 NW2d 112 (1981), our Supreme Court made clear that “[w]hat is henceforth required in all first-degree murder prosecutions in this state is that the trial court include within its instruction to the jury the element of malice as defined in *Aaron*.”

Because the trial court's jury instructions did not include all of the elements of the charged offense, there was error. *Canales, supra* at 574. However, "defendant has not demonstrated that it is more probable than not that the outcome would have been different without this error." *Lukity, supra* at 497. In this case, the evidence demonstrated that the victim's mother left her children with defendant in the morning on August 24, 2005. At that time, the children, including the victim, were in relatively healthy conditions. There was testimony about loud noises and children crying and screaming during the morning of August 24, 2005. This noise continued for a lengthy period of time, and the incident occurred one day after defendant violently swung the victim around, causing him to be frightened and injured. The victim's mother testified that when she returned, the victim was without clothes and non-responsive; the victim gasped for breath three times en route to the hospital. The victim's mother also testified that the victim had new bruises on his chest and thighs, and that his penis was swollen and bleeding. Defendant admitted that he was not a suitable baby sitter for small children and pointed out that the victim's older sisters feared him because of the long list of the victim's injuries. There was ample evidence regarding the victim's injuries, as well as expert testimony on how such injuries could be caused and the cause of death. In the context of this evidence, defendant has not demonstrated that the instructional error was outcome determinative. *Dumas, supra* at 409. This Court concludes that reversal is not warranted for this preserved, nonconstitutional error pursuant to MCL 769.26, because it does not "affirmatively appear that the error complained of has resulted in a miscarriage of justice." See *Dumas, supra* at 409.

Affirmed.

/s/ David H. Sawyer  
/s/ Michael J. Talbot